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No. 71-43

In the

Supreme Court of the United States

OCTOBER TERM, 1970

NATHAN GROSSGOLD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Petitioner, Nathan Grossgold, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on June 9, 1971 affirming a judgment of conviction of Nathan Grossgold previously entered in the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The judgment of the District Court is not reported. The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported but has been reproduced as an appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on June 9, 1971. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Should the indictment have been dismissed because the undue lapse of time denied to defendant Grossgold his rights to due process under the Fifth Amendment and to a speedy and public trial under the Sixth Amendment to the Constitution of the United States?

2. Did the District Court err in denying defendant Grossgold's motion for a severance and forcing him to trial along with his co-defendant Bornstein where both were represented by the same trial counsel and the defenses were antagonistic?

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the Constitution of the United States:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal cease to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

STATEMENT

Defendant, Nathan Grossgold, was indicted by the Grand Jury of the Court below in 13 separate counts charging violations of the mail fraud statute 18 U.S.C. 1341. Named in all 14 of the counts of the indictment was the co-defendant, Melvin Bornstein. R. 9-26.[1] Count 1 of the indictment charged a scheme to defraud certain insurance companies and that count as well as each of the others described specific mailings allegedly in execution of the scheme. Nine of the fourteen counts were selected for trial, R. 95, and both defendants were found guilty after a jury trial on each of the counts tried. R. 131. The defendant Grossgold was sentenced by the Court below to pay a fine of $3,500.00. No prison term nor period of probation was imposed. R. 138.

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[1] The record consists of the original documents filed in the District Court as compiled by the Clerk of that Court, for reference to which we have used the notation "R", the Court Reporter's transcript of proceedings in five volumes consecutively paginated, for reference to which we have used the notation "T", and the exhibits admitted into evidence in the District Court to which we have referred by exhibit number.

The judgment was affirmed on appeal to the Court of Appeals for the Seventh Circuit in an opinion dated June 9, 1971 and reproduced as the appendix hereto. In addition to its adverse rulings upon petitioner's claim that the evidence was insufficient to support the verdict, that Court held that this Court's decision in *Dickey* v. *Florida*, 398 U.S. 30 did not ". . . compel a decision here that the delay was a violation of defendant's right to a speedy trial."

Each of the mailings relied upon in the indictment, filed June 13, 1968, R. 9, to meet the requirements of the mail fraud statute occurred in the period between June 17, 1963 and December 4 of the same year. Each had to do with the presentation of subrogation claims to various insurance companies and, in one case, to an uninsured individual, on behalf of the Whitehall Mutual Fire and Marine Insurance Company of Skokie, Illinois. Whitehall, the evidence showed, was purchased by the defendant Bornstein and another individual in May 1961. T. 530. It closed in December 1963, T. 582, and all of its assets and records were turned over to the Illinois State Bureau of Liquidations in November 1964. T. 141. Defendant Grossgold was not connected with the company in any manner until the summer of 1962. T. 654. At that time the defendant Bornstein who is the brother-in-law of petitioner, persuaded that latter individual to leave his practice of law in New York and become associated with Whitehall Mutual as claims manager with a view toward eventually investing in the company. Grossgold remained as claims manager only until March 8, 1963, when he ceased drawing a salary. T. 657 et seq. At that time he entered the private practice of law as an attorney. After a six week hiatus during which he attempted to find office accommodations, he moved back into the same premises

housing Whitehall Mutual and opened his own law office. T. 660. At that time Bornstein, on behalf of Whitehall Mutual agreed to permit Grossgold to handle the company's subrogation claims against other insurance companies on a 25% basis. T. 661. It is the falsity of the documents supporting those subrogation claims upon which the fraud alleged in the indictment is predicated.

Twenty-five witnesses testified on behalf of the government at the trial. Three of those witnesses were officials of the Bureau of Liquidations and identified the records of Whitehall Mutual Insurance Company. T. 99, 121, 132. Four were persons insured by Whitehall who had been involved in automobile accidents and whose collision insurance claims had been paid by Whitehall. T. 199, 225, 256, 301. Their cars had been repaired and Whitehall subsequently made subrogation claims as a result of those accidents. Eleven of those witnesses were connected in one way or another with the several insurance companies listed in the indictment as victims of the fraud. Those individuals identified their own company files and testified to pertinent information regarding the mailings of claims, checks, releases, etc. upon which the indictment was based. In one instance the Whitehall subrogation claim was against an uninsured motorist and that individual, T. 313, as well as an officer of the bank in which she purchased money orders, T. 320, testified to the payment of Whitehall's claim. In one instance Whitehall's subrogation claim was handled by an attorney named Abrams because he also represented Whitehall's insured in a personal injury action. He testified on behalf of the government. T. 362.

Three of the other witnesses deserve special attention here. Mary Crabtree, who was the defendant Bornstein's secretary at Whitehall Mutual during its entire existence, testified generally to the handling of subrogation claims

by that company. T. 75. She testified that during the period when defendant Grossgold was claims manager the name Byron was used interchangeably by both Bornstein and Grossgold in connection with handling of claim matters. She identified the Whitehall Mutual files in connection with all of the particular transactions involved in the evidence. Ben Pekin, another government witness, testified that he invested $100,000 in Whitehall Mutual which turned out to be a very bad investment indeed. T. 434 et seq. He mentioned one transaction in which he received a $5,000 payment from Grossgold for a portion of his equity interest in the company. He stated, however, that the transaction was not finalized and Grossgold received his $5,000 back from Melvin Bornstein, never assuming any proprietary interest in the company. Generally, Pekin stated that at one point when he was active in the affairs of Whitehall Mutual, he was told by Bornstein, not Grossgold, that in handling subrogation claims against other insurance companies he should send out the biggest auto repair bill in the file. T. 452-458. The other significant government witness, Alfred Palumbo, testified that he was the owner and operator of a garage and auto repair shop. T. 375. He became connected with Whitehall Mutual through Reuben D. Katz, adjuster employed by that company. T. 376. Both Katz, we note, and John Hoffman, the other adjuster employed by Whitehall Mutual, were deceased by the time of the trial. T. 586, R. 95. He, Palumbo, gave specific testimony that repair bills were inflated in connection with three of the specific automobiles mentioned in the indictment and that on a fourth transaction upon which no count of the indictment was predicated, he submitted a repair bill although he never did the repair work. T. 404. On this occasion (the Small auto) he included a note to the defendant Grossgold, whom he

had met but once or twice, T. 420, that he did not do the repair work on the car along with his $400.00 repair bill. The evidence indicated that no claim for subrogation was ever made by Grossgold or anyone else on behalf of Whitehall Mutual in connection with that repair. Palumbo also testified generally with respect to conversations with Bornstein concerning the padding of auto repair bills and he mentioned that he delivered to Bornstein a pad of his own blank garage bills. T. 410-414.

Perhaps the best understanding of the facts in the specific subrogation case involved can be gained from the documents which were admitted into evidence. We propose then to go through these transactions one by one and summarize the contents of each file.

Exhibits 1 and 2. The Jacobs case. This file relates to the automobile accident sustained by one J. L. Jacobs insured by Whitehall Mutual. His car was repaired by Cermak Auto Construction Company, 3241 W. Cermak Road. Jacobs' testimony, T. 199, revealed that he paid only $50.00 pursuant to the deductible provision of his policy at the time his auto repairs were completed. The Whitehall Mutual draft to Cermak Auto, dated May 17, 1963, is in the amount of $10.00 indicating, taking the evidence in the light most favorable to the government, that the total cost of repairing the car was but $60.00. On June 3, 1963 Nathan Grossgold, as attorney for Whitehall Mutual advised the Safeguard Insurance Company of Chicago by form letter that a subrogation claim would be made in the matter. On June 13 Safeguard's representative requested proof of loss, a subrogation agreement and a paid auto repair bill in order to consider the claim further. On July 5 on Grossgold's stationery, he wrote that insurance company enclosing a paid Cermak Auto Construction repair bill in the amount of $160.00. The file

also contains a copy of the proof of loss, subrogation agreement and power of attorney forms all executed by J. L. Jacobs. On August 22, 1963 the Safeguard Insurance Company advised Grossgold that they denied liability on the claim but on October 4 that company agreed to settle the claim for $80.00. The insurance company's draft dated October 9, 1963 payable to Jacobs and Grossgold as his attorney, in the amount of $80.00 is also in the file. It indicates that it was deposited to Grossgold's account, as he testified was his practice, subsequent payment being made to Whitehall after a 25% deduction for attorney's fees. The Jacobs transaction is the basis of count 1 of the indictment.

Exhibits 3 and 4. The Montes case. This file, referring to the transaction involved in count 2 of the indictment, concerns an accident of one Antonio Montes, Whitehall's insured. Montes, who testified, T. 225, indicated that at the time he received his automobile after repairs he paid his $50.00 deductible plus a $35.00 charge because improved equipment was used on the car. The file contains two Whitehall Mutual drafts to Cermak Auto totalling $175.00. There is a form letter dated April 29, 1963 on Grossgold's legal stationery to one Joseph R. Steck, the individual involved in the accident with Whitehall's insured, indicating that a subrogation claim was being made. That was forwarded, according to the file, to the Traveler's Insurance Company. Among the correspondence between representatives of that company and Grossgold is a form letter forwarding a paid Cermak Auto Construction bill in the amount of $370.00 and the usual proof of loss, subrogation agreement, and power of attorney. Eventually the claim was settled by Traveler's with a payment of $320.00 to Whitehall Mutual Insurance Company as subrogee. The file contains Grossgold's accounting to

Whitehall for the proceeds of that draft on his stationery indicating that $80.00 was deducted as attorney's fees and that Grossgold's check for the $240.00 balance was forwarded to Whitehall Mutual."

Exhibits 5 and 6. The Baugh case. The file, referring to the transactions involved in count 5 of the indictment, is concerned with an accident involving repairs to the car of one Melvin Baugli, a Whitehall insured. T. 256. There is a Whitehall draft to Al Palumbo Auto Rebuilders in the amount of $50.00 and the bill of Al Palumbo Auto Rebuilders showing the payment of $100 deductible by the insured against an agreed price of $150.00. A subrogation claim was forwarded by Grossgold as attorney for Whitehall against Economy Fire and Casualty Company of Freeport, Illinois, on the usual form. He forwarded a different Al Palumbo Auto Rebuilder's bill marked paid and showing repairs in the amount of $190.25, along with the usual abrogation agreement. The claim was paid by Economy Fire and Casualty Company in the amount of $190.25 according to their draft in the file. There is also contained in the file a letter of Grossgold's to the Skokie Trust and Savings Bank which, the evidence indicated, had advanced a loan to Whitehall Mutual against their subrogation claims. That letter indicated that Grossgold deducted $47.56 for attorney's fees and forwarded a check for $142.69 due Whitehall to the bank pursuant to that agreement.

Exhibits 7, 8 and 9. The Overstreet case. The file refers to an accident involving one James Overstreet, Whitehall's insured. Overstreet was involved in an automobile accident with two other individuals, one Pfursich insured by Universal Insurance Company and one Speranske, insured by State Farm Mutual Insurance Company. The

exhibits indicate that the auto was repaired at Aurora Chrysler Plymouth, Incorporated, in Aurora, Illinois at a cost to Whitehall Mutual per their draft of $400.00. There is, however, contained in the file an Aurora Chrysler Plymouth estimate of repair costs in the total amount of $925.92. In addition, there is an estimate from Forest Auto Rebuilders, Inc. in the total amount of $1,032.81. Form subrogation claim letters were forwarded by Grossgold as attorney for Whitehall to both insurance companies. Universal Insurance Company settled for $525.00; State Farm settled for $150.00; both drafts are in the file. It appears from the documents in the file that the Forest Auto Rebuilders estimate, the larger of the two, was forwarded to both insurance companies and used as the basis of the eventual settlements. There is also a letter on the stationery of the defendant Grossgold as attorney, indicating the deduction of $168.75 as attorney's fees and the payment to Whitehall of $506.25. The Overstreet transactions are involved in counts 8 and 9 of the indictment.

Exhibits 10 and 11. The Bulow case. The file refers to repairs done upon the car of Whitehall's insured Olga Quear, nee Bulow. There is only one repair bill in the file from Al Palumbo Auto Rebuilders and it indicates that the price of the repairs to the car was $450.00 and Whitehall's insured paid $100.00. Those prices are entirely consistent with the testimony of Mrs. Quear, T. 301, and the Whitehall draft to Al Palumbo in the amount of $350.00 dated February 8, 1963. A subrogation claim was made against T. Kaminski, who was an uninsured motorist. His wife Adeline Kaminski testified, T. 313, that she had a conversation by telephone with an individual representing Whitehall who said his name was Byron. In that conversation she agreed to pay Whitehall's subrogation

claim in the amount of $500.00. The Exhibit file indicates that five personal money orders drawn on the Drovers National Bank of Chicago, each in the amount of $100.00 payable to Whitehall Insurance Company, were remitted by Ted Kaminski. The dates on those drafts respectively are, March 4, April 1, May 1, June 3 and July 3, 1963. All bear the stamped endorsement of Whitehall Mutual. There is, however, in the file a carbon copy of a letter, apparently written by Grossgold, dated September 23, 1963, addressed to Ted Kaminski, and indicating that Grossgold was unaware that the entire $500.00 had been paid since the letter demands further payment on the expressed assumption that only $100.00 had been paid. See T. 692. There is no indication that any part of the $500.00 recovery was ever paid to Grossgold, even for attorney's fees under his 25% agreement with Whitehall. The money orders were endorsed only by the Whitehall deposit stamp and not with Grossgold's deposit stamp which appears on those remittances he handled. T. 678.

Exhibits 12 and 13. The Sadowski case. This file, relating to an accident to the auto of Henry Sadowski, Whitehall's insured, contains three separate auto repair estimates of the Dura-Bake Auto Painting Company in the amounts of $260.50, $377.30 and $534.50 respectively. The Whitehall draft in the file indicates that $260.50 was paid Dura-Bake Auto Painting. Subrogation claim was made to Farmers's Equitable Insurance Company by Grossgold, again as attorney for Whitehall. The $534.50 estimate of Dura-Bake was forwarded to that company and the claim was settled according to the Farmers Equitable draft in the file for $484.50. Grossgold's letter to the Skokie Trust and Savings Bank indicates that he deducted $121.12 as attorney's fees and forwarded his check for $363.38 to that bank to apply against Whitehall's

outstanding loan. That transaction is dealt with in count 11 of the indictment.

Exhibits 14 and 15. The Hayes case. This file involving an accident to the car of one Walter Hayes, insured by Whitehall, contains an Al Palumbo Auto Rebuilders bill in the amount of $140.00 minus a $50.00 deductible paid by the insured. Whitehall Mutual's draft in the amount of $90.00 dated June 19, 1963 is included along with the usual abrogation agreements, etc. Grossgold's form letter claiming subrogation as attorney for Whitehall Mutual was sent to the Aetna Insurance Company. A Public Pontiac, Inc. estimate of repair cost in the amount of $237.08, also contained in the file, was forwarded to that company and eventually the subrogation claim was paid in that amount by Aetna draft. The file also indicates that Grossgold deducted $59.27 as attorney's fees forwarding the balance to Bornstein and Whitehall Mutual. The Hayes transaction is involved in count 12 of the indictment.

Exhibits 16 and 17. The Marquez case. This file regarding an accident to the automobile of Whitehall's insured, Guadalupe Marquez, contains two Whitehall drafts to Cermak Auto Construction, one in the amount of $25.00 and one in the amount of $50.00 as well as a receipt indicating payment of a $50.00 deductible by the insured. Subrogation was sought from Western States Mutual Insurance Company of Freeport, Illinois by Grossgold, as attorney, and again he forwarded a Cermak Auto Construction repair bill in the amount of $310.00 along with the usual subrogation agreement. Eventually, Western States Mutual settled the claim with a payment of $260.00. The file indicates that Grossgold deducted attorney's fees of $65.00 and paid Whitehall $195.00. The transaction is involved in count 14 of the indictment.

Exhibit 26. The O'Neil case. Exhibit 26 pertains to the file relating to Whitehall's insured, Toy O'Neil. There are two bills in the file from M. L. Auto Rebuilders, one for $106.30 bearing a notation that it was approved by the deceased Mr. Katz. The second M. L. Auto bill in the amount of $219.67 was submitted in support of a subrogation claim on January 14, 1963 by Ben Pekin, the government's witness. The insured, O'Neill, paid a $50.00 deductible and Whitehall's drafts indicated that it paid $50.00 to M. L. Auto Rebuilders and $15.00 to Mr. Katz. There is nothing in this entire Exhibit file that in any way pertains to Nathan Grossgold. There is no count of the indictment predicated upon this file and no indication that Grossgold had anything whatever to do with the case.

Exhibits 18 and 19. The Dominguez case. These files relating to Whitehall's insured, Louis Dominguez, was forwarded by Whitehall to Daniel L. Abrams, an attorney. Abrams, it appeared, represented Whitehall's insured in connection with his personal injury claim against the other party to the accident who was insured by Traveler's Insurance Company. T. 362. Accordingly, Whitehall retained him to represent it in connection with the subrogation claim. A Cermak Auto bill in the amount of $365.00 was forwarded to Traveler's by Abrams on March 22, 1963. Traveler's eventually settled the subrogation claim for $190.00 from which Abrams deducted his attorney's fee of $47.50, remitting the balance to Whitehall. By a letter from Abrams to Whitehall dated May 8, 1963, Mr. Abrams explained that enlarged pictures showing the damage to the auto which had been forwarded to Traveler's destroyed any chance of a full recovery of $365.00 and required the $190.00 settlement. Whitehall's drafts in the file indicate that in fact $200.00 was paid by it to Cermak Auto in the matter. The only reference in this entire file to Nathan

Grossgold concerns the original referral of the matter to Abrams. Grossgold, who at the time the case arose was still employed as claims manager for Whitehall, was the individual who first referred the matter to Abrams for processing along with the personal injury case. These transactions as well were not specifically the subject of any count in the indictment.

Exhibit 20. The Small case. This file concerns an accident to the vehicle of Albert Small, Whitehall's insured. There are in the file four repair bills, one from Litsinger Motor Company in the amount of $255.00, one from Al Palumbo Auto Repairs in the amount of $275.00 and one from Crest Motors in the amount of $264.97. Whitehall's policy contained a $50.00 deductible provision and it appears that actual payment was made to Litsinger in the amount of $205.00 by Whitehall. There also appears in the file a bill of Al Palumbo Auto Rebuilders in the amount of $400.00 dated March 7, 1963, marked "paid in full—Al Palumbo". To that bill is attached an undated note addressed to Nate indicating that the writer did not do the repair work on the vehicle, but that he remembered it to be "about a $275.00 job", signed "Al". The Whitehall file, however, indicates that no claim for subrogation was ever made by Whitehall in connection with this transaction and this file jacket is marked "closed" on June 13, 1963 with the initials N. G. G.

Rebuttal Exhibits 27, 29 and 33. The Sopenar, Dong, and Chandler cases. Each of these three files was admitted into evidence in rebuttal and none bears specifically upon any count of the indictment. Exhibit 27, the Sopenar file, indicates that there was some dispute between Whitehall and its own insured with respect to the payment of a claim under its collision policy. Exhibit 27-1, a part

of this file, is a note marked "from the desk of Melvin Bornstein". The text of that note is as follows:

> "Nat—Didn't pay this but see if we can collect. If so, I'll pay and get subro agreement signed for better amount."

Along the side of that note is written in another hand the word "disregard". No claim was ever processed by Grossgold or anyone else for subrogation in this particular transaction. As a matter of fact, it appears that Whitehall never actually paid any amount under its collision coverage.

Exhibit 29, the Dong file, contains two bills from Shoreline Auto Service of Evanston, one in the amount of $220.00 and one in the amount of $395.66. There is also a sworn, signed statement from Howard Dong intended to prove his loss, indicating that the damage to his automobile was $395.66. Whiehall, however, paid Shoreline $220.00. The subrogation claim was handled by Grossgold as Whitehall's attorney, and he submitted the larger bill to the Allstate Insurance Company. On July 9, 1963 that company paid $395.66 in settlement. Grossgold deducted $92.98 in attorney's fees and remitted $296.74 to the Skokie Trust and Savings Bank pursuant to Whitehall's loan agreement.

Exhibit 33, the Chandler file, indicates that Whitehall Mutual paid Cermak Auto $125.00 to repair that automobile. There are bills from Cermak in the amount of $235.05 and Litsinger in the amount of $305.85. The file indicates that a subrogation claim was made against Allstate but it does not indicate the eventual disposition of that claim, any payment by Allstate, or which bills, if any, were forwarded to that company by Grossgold who handled the claim.

The files which we have analyzed above were compiled and consolidated by the government for purposes of trial from essentially three distinct sources. There were the records first of Whitehall Mutual which the government obtained from the State Bureau of Liquidations. Also from the State Bureau of Liquidations came some of the records of the defendant Grossgold in his capacity as a private attorney. Those records were placed with the Whitehall records and turned over to the Bureau when Whitehall went into liquidation. The third source of the documents contained in the government exhibit file was the files of the various insurance companies against whom subrogation claims were made. It is important to point out here that the files do not indicate with specificity which documents were available to which individuals at what times. Particularly is this so in considering the case of the defendant Grossgold. As attorney for Whitehall Mutual Grossgold received, according to the evidence, something called a skeleton file. There is no evidence in the record from which it can be concluded that the skeleton file forwarded to Grossgold contained more than one bill or repair estimate, as the case may be, in any one case. During his earlier period of employment, however, as a claims manager for Whitehall Mutual there is no question but that Grossgold had access to the entire Whitehall file. We point out that in each of the transactions involved in any specific count of the indictment, Grossgold's prosecution of the claim and the evidence indicating that he forwarded an inflated bill, took place during a period in which he was attorney for Whitehall Mutual not during the period he was employed as claims manager. The notable exceptions to that statement among the files in the evidence on trial concerned: (1) the O'Neil matter in which the inflated bill was forwarded by Pekin at Bornstein's direction; (2) the Domin-

guez matter in which the inflated bill was forwarded by Abrams and although Abrams testified, the record is silent concerning what individual it was who provided him with the inflated bill; (3) the Small case in which no claim was filed.

So in connection with an insurance company paying thousands of claims, all of whose records were turned over to the custody of the State Bureau of Liquidations in 1964, 140 files were examined by Postal Inspector Potter. T-516. Of those 140, 29 were selected for further investigation and only 14 included in Inspector Potter's final report. Of the 14, 8 found their way to trial in the Court below.

Each of the defendants testified on his own behalf at the trial. Nathan Grossgold was an individual 55 years of age at the time of the trial, who had been a member of the bar of the State of New York since 1941. He was also admitted to practice in the District of Columbia and the State of Illinois as well as before the Supreme Court of the United States. T-648. A native New Yorker, he practiced law in that state until 1962 when he, yielding to the blandishments of Bornstein, moved to Illinois with his family to accept the position he held initially at Whitehall. Since he left the direct employ of the company and entered his own private practice of law in 1963, he has been engaged in that practice in Chicago and its environs. He explicitly denied any knowledge that any of the garage bills had been inflated.

The indictment was returned June 13, 1968. Many of Grossgold's files concerning these transactions had been destroyed approximately February 1, 1968. R.45. Other files of his as well as those of Whitehall were placed in storage and turned over to the Bureau of Liquidations in November 1964. Neither Grossgold nor Bornstein had ac-

cess to the files thereafter. In view of the inordinate lapse of time before indictment, a motion was filed on behalf of both defendants to dismiss for want of a speedy trial. R.45, 84. In response to the second such motion the affidavit of Inspector Potter appearing in the record on page 92 was filed in the Court below. In that affidavit Inspector Potter indicated that two individuals, Anthony Zizzo of Cermak Auto Construction and Reuben D. Katz, the adjuster employed by Whitehall, both were interviewed by him prior to his compiling his final report. Both were dead at the time of trial. A third individual, John Hoffman, also employed by Whitehall as an adjuster was also dead at the time of trial. We point out that in Potter's affidavit itself, he indicates that Zizzo had told him on March 19, 1968 that he had inflated bills of Cermak Auto Construction and that he did that for the defendant, Melvin Bornstein. Nowhere did Potter indicate that Anthony Zizzo had anything bad to say about Nathan Grossgold. That motion to dismiss, renewed many times by the trial counsel for defendants, was repeatedly denied in the District Court. R.66, 97; T.74.

REASONS FOR GRANTING THE WRIT

1. The crimes charged in the indictment were alleged to have occurred between June 17, 1963 (count five) and December 4 of the same year (count 13). Four counts charged offenses occurring in June and four additional counts charged offenses occurring in July, 1963. The indictment was not returned until June 13, 1968. It appears that Whitehall Mutual ceased operating at the end of 1963 and that its records were shortly thereafter placed in storage in a warehouse in Skokie under the auspices of the Department of Insurance of the State of Illinois, Bureau of Liquidations. In 1965 a liquidator was appointed for Whitehall in the Circuit Court of Cook County and the records were removed from the warehouse and examined by that department. Defendants had no access to the records of Whitehall at any time after that company closed its doors. In addition, we point out, defendants had no knowledge of any pending investigation by any federal agency and they were not interviewed in the course of the investigation. In fact, Grossgold testified he was "Shocked" to learn of the return of the indictment. T.675. The postal inspector, Eugene W. Potter, indicated in his affidavit, 9. 92, that he obtained the records of Whitehall from the Department of Insurance during the summer of 1966, three years after the alleged commission of the crimes charged but two full years prior to the return of this indictment. Defendants moved on two occasions prior to trial, R. 44, 84, to dismiss the indictment because the untoward and unnecessary delay in its return had irretrievably prejudiced their capacities to defend. Both of those motions were denied; they should have been granted.

Three individuals who could have given pertinent testimony upon the trial of this case were dead by the time the trial was held in the District Court. Two of them, Anthony

Zizzo and Reuben D. Katz, were interrogated by Inspector Potter in the course of his investigation. A brief summation of the information he obtained from Zizzo is included in his affidavit filed in the District Court in response to defendant's renewed motion to dismiss. It can readily be seen that the testimony of Zizzo would have been important, perhaps pivotal in the defense of Nathan Grossgold, for Zizzo, according to Potter, stated that he inflated bills *for Bornstein*, that he delivered inflated bills *to Bornstein*, and that he did so at the request *of Bornstein*. Zizzo's testimony would have underscored the fatal weakness in the government's case against Grossgold because Grossgold would have been able to have proved affirmatively that it was Bornstein, not Grossgold, who harbored the guilty knowledge and the fraudulent intent to deceive. But because of the delay, Zizzo was dead.

It also appeared in the evidence that Al Palumbo, the only garage owner to actually testify, was introduced to the affairs of Whitehall Mutual by Reuben Katz. Although Potter interviewed Katz, it appears from Potter's affidavit that he did not possess information regarding that individual's relationship with Palumbo. Again the information that Katz did give to Potter would have been helpful to Grossgold because it was clear that Katz dealt largely with Bornstein. So then defendant Grossgold was put to trial without the benefit of the testimony of two most significant witnesses upon an indictment returned four days before the running of a 5 year Statute of Limitations.

On those facts it is our contention that the Court of Appeals misapplied this Court's decision in *Dickey* v. *Florida*, 398 U.S. 30. We suggest that the writ ought to be granted in the instant case for the explicit purpose of further delineating the salutory principles of that decision and

clarifying the extent to which a defendant must demonstrate a prejudicial effect upon his capacity to mount his defense before he may win dismissal of the indictment on the basis of an undue pre-prosecution delay. The language of the opinion in *Dickey* is pertinent:

> "On this record the delay with its consequent prejudice is intolerable as a matter of fact and impermissible as a matter of law." 398 U.S. 30, 38.

There can no longer be any question that the right to a speedy and public trial guaranteed by the Constitution's Sixth Amendment is an important and sensitive protection intended to preserve elemental fairness in criminal trials. *Klopfer* v. *North Carolina*, 386 U.S. 213. The purposes of that guarantee have been set out by this Court in two opinions in addition to *Dickey*. *Smith* v. *Hooey*, 393 U.S. 374, listed three principal purposes underlying the guarantee of speedy trial. First, of course, is the elimination of unnecessary pretrial incarceration. Second, this provision operates to minimize the anxiety and concern attendant upon public accusation of serious crime. Third, and most important to our contentions here, this Court emphasized that the speedy trial provision was intended to prevent the impairment of a defendant's ability to defend himself. That same purpose was explicitly set forth in *United States* v. *Ewell*, 383 U.S. 116. We argue here that it is with those most important constitutional purposes in mind that the reasonableness, and hence the constitutionality, of the delay which occurred in this case ought to be measured.

The delay which occurred here was largely prior to the return of the indictment and we concede that the indictment was returned within the applicable period set out in the Statute of Limitations, 18 U.S.C. 3282. We recognize that the Statute of Limitations is the primary guarantee

against the prosecution of the stale criminal case. *United States* v. *Ewell,* 383 U.S. 116. We contend, however, that the Statute of Limitations is not the only guarantee.

The question whether the speedy trial provision of the Sixth Amendment and the due process clause of the Fifth Amendment ought to be applied to dismiss indictments for unreasonable pre-indictment delay concerned Mr. Justice Brennan concurring in the *Dickey* case. We believe that opinion unmistakably supports our position here. As the Court below put it in *United States* v. *Delaney,* 389 F. 2d 324 (7th Cir., 1968):

> "We think we should concede that it is possible to conceive of a delay less than the period of the Statute of Limitations that would be so unreasonable and the prejudice to defendant so great, that relief under the Fifth Amendment should be afforded." 389 F. 2d 324, 325.

This is that case, this is that kind of delay.

In this case the delay amounted to 4 years, 11 months and 26 days. In this case the claim of prejudice is not predicated upon the nostrum that time dulls memory, but upon the intervening death of two important witnesses and the destruction of significant records.

Regarding the application of the Fifth and Sixth Amendments to pre-indictment delay we urge upon the Court what was said in *Nickens* v. *United States,* 323 F. 2d 808, 812 (D.C. Cir. 1963), by Judge Wright concurring, and reiterated in *United States* v. *Kaufman,* 393 F. 2d 172 (7th Cir., 1968), that pre-prosecution delay has more potential for injustice than any delay between indictment and trial. In the pre-prosecution situation a potential defendant has no incentive to record his recollection while events are still fresh in his mind. He has no reason to attempt to per-

petuate the testimony of potential witnesses on his behalf and no need to reconstruct from records the events which are now to be proved against him. By the time the eventual oppressive prosecution is brought, memory has already failed, witnesses have already been lost, and records long since destroyed. Due process requires that, although the government may prosecute, it must not be permitted at the same time and by its own action to impair the ability of its citizen to mount his defense.

To summarize, we think that the critical consideration in all of this must involve a determination of whether or not the delay seriously compromised the fairness of the proceedings against the defendant. To Nathan Grossgold prejudice was clear, so clear in fact, that in this case there is no need to reach the question whether a defendant must prove prejudice or whether the burden should be upon the government to prove its absence. *United States* v. *Hauff*, 395 F. 2d 555 (7th Cir., 1968); Note, *The Right to a Speedy Trial*, 20 Stanford L. Rev. 476, 485 et seq. (1968). A simple reading of Inspector Potter's affidavit which the government filed demonstrates the significant consequences of this delay to Grossgold. Again we advert to the opinions in *Dickey* v. *Florida*, 398 U.S. 30. There the actual prejudice to the defendant apparent from the record consisted of the death of two witnesses, the unavailability of a third and the destruction of police records. Here we have the death of three witnesses, two of real importance, and the destruction of Nathan Grossgold's own records. In *Dickey*, the defendant had knowledge of the pendency of the Florida prosecution against him from the date of his identification three days after the robbery; his incarceration on other charges made the preparation of a defense impossible. Here the preparation of a defense during a long five year delay was equally impossible for Grossgold had no

idea of the charges he eventually faced in the Court below.

We ask this Court to reverse this conviction and dismiss this indictment whether it be pursuant to the due process clause of the Fifth Amendment, the speedy trial provision of the Sixth Amendment, the supervisory power of this Court, or any combination of all three. With Mr. Justice Brennan concurring in *Dickey* we say:

> "[T]he speedy trial guarantee should receive a more hospitable interpretation than it has yet been accorded." 398 U.S. 30, 57.

2. On two occasions prior to trial formal written motions were filed by the defendant Grossgold requesting a severance and a trial separate and apart from that of the defendant Bornstein, R. 37, 68. That motion was denied. During the course of the trial it was renewed and again denied by the trial judge. T. 731. The full extent of the antagonism between Grossgold's defense and that of Bornstein is now apparent. The full extent of the danger to Grossgold of a guilty verdict based on his association with Bornstein and Whitehall is also now apparent.

The government's evidence on the trial which we have reviewed in detail *supra* established that Grossgold was the attorney for Whitehall during the pertinent period and that Bornstein was operating head of that company. It also established that Grossgold forwarded claims in subrogation cases to the various insurance companies involved and that some of the documents supporting those claims had in fact been falsified by someone. Grossgold claimed that he did nothing that a normal attorney would not have done in simply processing claims of a client based upon data provided him by his client. The difficulties of presenting such a defense effectively in a joint trial should be obvious.

The real problem with which a defendant in Grossgold's position is faced in a joint trial in a situation such as this record presents, is the real and substantial danger that the jury will infer guilt from the evidence of his association with the co-defendant and the company, that the jury will add the evidence of wrongdoing by someone to the close association between Grossgold and Bornstein and reach a conclusion that is not justified by a careful analysis of the evidence in the case. Bornstein, after all, is Grossgold's brother-in-law. Grossgold, during the period in which the crimes charged in the indictment were alleged to have been committed, was a tenant of Bornstein's Whitehall Mutual and occupied office space in the same building as Bornstein. At the time of the trial Grossgold and Bornstein occupied adjoining offices in a different building. Add to this the circumstance that the defendants were represented by the same attorney at the trial and the difficulties facing even a conscientious jury in its attempt to analyze and segregate the evidence are revealed as very substantial indeed. A difficult task for lawyers and judges becomes impossible when thrust upon a lay jury. That all this was of substantially greater prejudice to Grossgold than to Bornstein is certain. The very disparity between the two-year prison term the trial judge imposed upon Bornstein and the simple fine without any attendant incarceration or period of probation which he imposed upon Grossgold indicates that he too, eventually at least, was alive to the distinctions that existed between the cases of the two defendants. The joint trial could only blur these distinctions.

A word more must be said about the representation of both Bornstein and Grossgold by the same trial attorney. Utilizing the twenty-twenty vision of hindsight, it is easily seen that each of these defendants should have been represented by separate counsel in order to fairly protect their

own individual interests in the outcome of the trial. We have found one decision in which the District of Columbia Circuit, per Judge Washington, made this statement:

> "When two or more defendants are represented by a single counsel, the District Court has a duty to ascertain whether each defendant has an awareness of the potential risks of that course and nevertheless has knowingly chosen it."
>
> *Campbell* v. *United States*, 352 F. 2d 359, 361 (D.C. Cir., 1965).

The record in the case at bar does not reveal that either of the defendants were advised by the trial judge in any manner with respect to the perilous course upon which they had apparently embarked. We do not mean to imply any lack of competence or diligence on the part of distinguished trial counsel. We do suggest, however, that the monumental task of effectively representing both of these defendants in the same trial was more than could be expected of any lawyer. As a part of his fundamental obligation to insure fairness in criminal trials, we believe it the responsibility of the trial judge in such a situation either to conduct the trial of each defendant separately or at the very least to insure that the defendants' decisions were informed decisions based upon a judicial warning of the possible ultimate consequences of that course. This trial judge did neither and the resulting trial was predictably unfair to Grossgold.

We recognize the interests of judicial administration in avoiding somewhat repetitive trials, but we contend that that interest must be subordinate to the preservation of the elemental fairness of the criminal process to persons accused of crime. We concede that separate trials are not favored. Indeed in most circumstances they ought not to be favored. But when, as here, that is the only fair way to

try an individual accused of crime, then we contend that it is the only constitutional way.

CONCLUSION

To review the application by the Court of Appeals of this Court's decision in *Dickey* v. *Florida*, 398 U.S. 30, and because the District Court's denial of a severance and conduct of petitioner's trial together with that of the co-defendant, both of whom were represented by the same trial attorney, denied petitioner effective assistance of counsel, we respectfully petition this Court to issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Attorney for Petitioner

July, 1971.

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 17860 and 17861

SEPTEMBER TERM, 1970 JANUARY SESSION, 1971

No. 17860
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MELVIN S. BORNSTEIN,
Defendant-Appellant.
No. 17861
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
NATHAN GROSSGOLD,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUNE 9, 1971

Before KILEY and CUMMINGS *Circuit Judges,* and MORGAN, *District Judge.*[1]

KILEY, *Circuit Judge.* Defendants Bornstein and Grossgold were each convicted by a jury under nine counts of an indictment charging violations of 18 U.S.C. § 1341 in the use of mail to further a scheme to defraud. Both have appealed. We affirm.

Bornstein and Albert Rosenthal, a "relative" of Bornstein, formed the Whitehall Insurance Company in 1961. In May, 1961, they acquired an inactive insurance company

[1] Judge Morgan of the Southern District of Illinois is sitting by designation.

and activated it under the name of Whitehall Mutual Fire and Marine Insurance Company. Bornstein's brother-in-law, Grossgold, a New York attorney, became claims manager of Whitehall in 1962. In March of 1963 his employment by Whitehall was terminated, but as an independent attorney working in the Whitehall office building he continued to handle subrogation claims for Whitehall against other insurance companies on a percentage basis. It is upon the falsity in documents supporting the subrogation claims filed by Grossgold that the charges of fraud before us are based.

Whitehall ceased doing business in December of 1963, and its assets and records were turned over to the Illinois State Bureau of Liquidations in November of 1964. The indictment before us was filed in June, 1968.

Each defendant contends that the evidence is insufficient to sustain the verdict against him; that he was denied his constitutional right to a speedy trial; that reversible error was committed by the courts' denial of a severance of his trial from that of the other; and that he was prejudiced by denial of continuance to obtain another lawyer.

I.

Defendants contend there is insufficient evidence to support the guilty verdicts. We see no reason to discuss in detail the abundant proof adduced at trial to sustain the verdict. The fraudulent scheme was shown by the testimony of Palumbo, one of the garage owners involved in the scheme, that either Bornstein or Grossgold would call him to make arrangements for repair of a damaged automobile covered by a Whitehall policy. After examining the car, Palumbo would make up a written estimate for the cost of repairs and convey it to Whitehall, and an agreement would be made between Palumbo and Bornstein or Grossgold to repair the automobile at a cost lower than the estimate. The estimate, marked "paid," would then be sent to the insurer of the person whose car collided with that of Whitehall's insured, along with a subrogation claim written by Grossgold. Whitehall would then be paid the amount stated on the estimate.

This testimony was fully corroborated by Whitehall's files. For example, insured Baugh's file, used in proof of Count V, contains an estimate on Palumbo's stationery in the amount of $190.25, marked "paid"; a cover letter written by Grossgold to Economy Fire and Casualty Co., insurer of the driver of the other automobile involved in the Baugh collision, referring to "the paid repair bill in the amount of $190.25" which was sent with the letter; and a check from Economy in the amount of $190.25 made payable to Baugh and/or Grossgold. The file also shows a bill from Palumbo for "agreed price $150.00" minus "$100.00 Ded.," with a balance due of $50.00; a check made payable to Palumbo in the amount of $50.00 signed by Melvin Bornstein on behalf of Whitehall; and a letter to insured Baugh directing him to pay his $100.00 deductible directly to Palumbo. Palumbo testified that he and Whitehall agreed on $150.00 to make that particular repair, and that he received $100.00 of that amount from the insured (the policy had $100.00 deductible) and $50.00 from Whitehall. The pattern was followed, generally, with respect to each count in the indictment.

There is ample proof to justify the jury in inferring that both Bornstein and Grossgold knowingly participated in the proven scheme to defraud. In addition to Palumbo's testimony as to the active participation of both Bornstein and Grossgold, there is the testimony of Pekin, another Whitehall employee who occasionally wrote letters regarding subrogation claims, that Bornstein told him that the reason the subrogation claims were inflated was to cover legal costs and handling expenses. And the record also contains a note written by Bornstein to Grossgold directing Grossgold to see if he could collect on another subrogation claim, and if he could, Whitehall would "pay and get subro agreement for better amount."

There is also evidence that Grossgold, who directly handled the subrogation claims, wrote a note to an uninsured motorist whose car had collided with that of a Whitehall insured, concerning arrangements for payment of a

subrogation claim in the amount of $500.00. The top of the Whitehall file in that case reflected that total payments by Whitehall were only $350.00, and Grossgold admitted that he had written on the Whitehall file a notation of a conversation with the uninsured motorist. And the note from Bornstein and another note from Palumbo indicated that Grossgold was aware that Whitehall sent out inflated subrogation bills, even if Grossgold did not pursue the claims in those particular cases. There is substantial evidence that both Bornstein and Grossgold knew the subrogation claims were fraudulent.

In imprisoning Bornstein for two years, and merely fining Grossgold, the district court evidently had in mind the pro rata fraudulent participation of defendants in the several offenses. The distinction between the defendants' guilt shown in sentencing, however, is no indication that the joint trial resulted in the jury's convicting Grossgold merely because of his association with Bornstein. Rather the sentences show the court's determination of the degree of guilt of each defendant.

II.

The crimes charged in the indictment are alleged to have occurred between June 17, 1963 and December 4, 1963. Whitehall voluntarily turned over its books and records to the Illinois Department of Insurance at the end of 1963.[2] The Department alerted the postal authorities who in 1965 or 1966 began the investigation which led to the indictment. The investigation, involving over 140 files, ended on April 18, 1968. The indictment followed on June 18, and the jury returned its verdicts March 10, 1969.

During the investigation interviews were conducted of Whitehall's insureds and of persons insured by other companies. Hoffman, a claim adjuster for Whitehall, died in

[2] The books and records were warehoused by the Department until a liquidator for Whitehall was appointed in 1965 and the records removed for examination by the Department.

January, 1963. Zizzo, owner of one of the garages allegedly involved in the scheme, was interviewed in March, 1968, and died in October, 1968. Katz, another Whitehall adjuster, was interviewed in February, 1968, and died in November, 1968. The investigation ended and the report was given the United States Attorney in April, 1968.

Postal Inspector Potter who conducted the investigation filed an affidavit in support of the government's response to defendants' motion to dismiss the indictment for the delay. In this affidavit, Potter stated that Zizzo told him at the March 1968 interview that he had, at Bornstein's request, "inflated bills" for repairs and either mailed or delivered them to Bornstein; and that Katz told Potter at the February interview that he worked for Bornstein, that Bornstein and Grossgold took care of all the claim work and that Katz always turned over the work to Bornstein. No written statements were signed by Zizzo or Katz and neither testified before the grand jury.

Both defendants contend that this delay between the time the offense was committed and the day the indictment was returned denied defendants the right to a speedy trial and to due process. Both defendants rely upon *Dickey v. Florida,* 398 U.S. 30 (1970), and the prejudice resulting from the delay. Specifically, the prejudice relied upon is the death of Zizzo and Katz, and the destruction of part of Grossgold's records—all of which events occurred between 1965 and 1968.

We see no merit in the contention that the district court committed reversible error in denying the motion to dismiss. The statute of limitations would have run against the offenses if indictment was delayed four days longer. But this is not conclusive, *United States v. Haggerty,* 419 F.2d 1003 (7th Cir. 1969). *See United States v. Ewell,* 383 U.S. 116 (1965). It had not run when the indictment was filed, *United States v. Panczko,* 367 F.2d 737 (7th Cir. 1966), and while it is possible that a delay within the statute of limitations could be so unreasonable and prejudice so great that due process would be violated, *United States*

v. Deloney, 389 F.2d 324 (7th Cir. 1968), this is not such a case.

The affidavit of Potter indicates that both Katz and Zizzo would have incriminated Bornstein if they were alive and had testified. Their death prior to trial was in effect prejudicial to the prosecution and not the defense. And Grossgold's indirect benefit from Zizzo's and Katz's statements that they dealt with Bornstein was minimal in view of the ample testimony of Grossgold's main participation, through his work as attorney in preparation of the subrogation claims. Also, Hoffman's testimony would have been of no value to the defense since he died in January of 1963, a time prior to most of the activities alleged in the indictment. And we are unable to see how Grossgold's destruction of his records could prejudice him under the facts here.

Dickey v. Florida, supra, does not compel a decision here that the delay was a violation of defendant's right to a speedy trial. In *Dickey* there was an eight year delay between arrest and trial, during which Dickey continually demanded trial, and the prosecutor provided no good reason for rejecting the demands. Here there was a two year delay in discovery of the possible fraud and a three year delay during which the postal authorities examined 140 files and selected 29 files for further investigation. This delay is not unusual in a case which requires extensive investigation of documents. We cannot say that it constituted "[d]eliberate governmental delay designed to harm the accused" condemned in *Dickey*. This case is closer to *United States v. Lee*, 413 F.2d 910 (7th Cir. 1969). There we rejected a similar claim on the basis that testimony at the trial showed no prejudice and defendant was able to recall specific facts concerning the incident in question.

III.

Each defendant also claims reversible error in the court's denial of each defendant's motion for severance. This ruling was made within the court's discretion. *United States*

v. Echeles, 352 F.2d 892, 897 (7th Cir. 1965). We see no abuse of discretion. Implicit in each one's argument on this point is a claim of prejudice in being tried with the other—the culprit. Bornstein's defense was good faith reliance on attorney Grossgold who "had complete knowledge of the files." Grossgold's argument is that trial with Bornstein exposed him to a finding of guilt by association with Bornstein and Whitehall, since he was an attorney for Whitehall and tenant of the office space in the same building and relied upon bills prepared by Bornstein.

Mutual hostility between the defendants is evident. But that does not alone control the court's discretion on the severance motions. *Dauer v. United States*, 189 F.2d 343, 344 (10th Cir. 1951), *cert. den.*, 342 U.S. 898. The district court was not required on the showings made to conclude that the respective asserted defenses precluded a fair trial to each. *See United States v. Hutul*, 416 F.2d 607, 620-21 (7th Cir. 1969). Although each sought to escape conviction by placing the guilt on the other, their defenses were actually compatible since both claimed ignorance of the transactions.

Defendants cite *United States v. Echeles*, 352 F.2d 892 (7th Cir. 1965), and *Campbell v. United States*, 352 F.2d 359 (D.C. Cir. 1965). Those cases are distinguishable. In *Echeles*, a co-defendant made a statement which could have exculpated the defendant and this court ordered a severance. In *Campbell*, the evidence against one defendant was overwhelming and the evidence against the other insignificant. The court ruled that the defendants' trial should be severed because the person against whom the evidence was slight could be prejudiced by being tried with the other defendant. The showings made by the defendant in both those cases went far beyond a showing of hostility.

IV.

Both Bornstein and Grossgold claim prejudice in denial of their motion for a continuance in order to obtain

an additional attorney. They argue that representation by the same attorney prejudiced each. We see no merit in this point. The motions for separate trials were made November 23, 1968, and a 60 days continuance was sought to obtain an additional attorney. Although the motion was not granted, the trial began more than 60 days after the motion was made. There was ample time to obtain the attorney before trial to avoid what prejudice, if any, resulted from lack of an additional attorney.

For the reasons given, the judgment is AFFIRMED.